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No. 373

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NATIONAL TRAILER CONVOY, INC., *Appellant*,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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Appellant, National Trailer Convoy, Inc., received the Appellees' Motion to Affirm on the 23rd day of August, 1965, and pursuant to Rule 16, Paragraph 3 of the Rules of this Court, files this brief opposing the motion.

STATEMENT OF THE CASE

Appellant's jurisdictional statement contains a Statement of the Case and no useful purpose would be served by a restatement here.

ARGUMENT

The Motion to Affirm is based upon Rule 16, Paragraph 1(c) of the Rules of this Court and contends that "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

1. THE COMMISSION'S DECISION IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE

One of the questions presented by this appeal (J. S. 2, Issue No. 1) concerns the responsibility of a United States Court in reviewing a United States Agency's action pursuant to the Judicial Review Provisions of the Administrative Procedure Act, 5 U. S. C., Section 1009, especially 5 U. S. C., Section 1009 (e) (B) (5). The pertinent provision of 5 U. S. C. Section 1009(e) reads as follows:

> ". . . (T)he reviewing court shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence. . . ."

This Court in the case of *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, noted the Pre-Administrative-Procedure-Act criticism of judicial review standards and examined the committee reports and reasons behind the Congressional enactment of the Administrative Procedure Act. At page 484 of the *Universal Camera Corp.* case appears the following observation:

> "The committee reports of both houses refer to the practice of agencies to rely upon 'suspicion, surmise, implications, or plainly incredible evidence,' and indicate that courts are to exact higher standards 'in

> the exercise of their independent judgment' and on consideration of 'the whole record.' "

The "higher standards" were defined by this Court in a number of cases wherein this Court discussed what is meant by "substantial evidence." One of such cases is *N. L. R. B.* v. *Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292, wherein, at page 300, this Court defined "substantial evidence" as follows:

> "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

This definition was reiterated in the *Universal Camera Corp* case, *supra* at page 477.

In applying this test, a reviewing court, as well as the agency itself, must remember that the public is a third party in the proceedings and unrepresented except by the agency. It is the public convenience and necessity or interest that is at stake. The traditional civil court preponderance of the evidence test is inappropriate and when a poor record is all that is available to the agency, the agency must insist that further evidence be presented before it acts in the public interest. The following often quoted statement is found repeated in Terminal Charge on Order Bills of Lading Shipments, 315 I. C. C. 327:

> "They (administrative agencies) are not expected merely to call balls and strikes, or to weigh the evi-

> dence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in. . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible. . . ."

Thus, it can be seen that the question is not whether the applicant or protestant involved in an I. C. C. matter should win, but whether the public has been adequately protected and its interests served by the Commission's findings. If neither the applicant nor the protestant produces substantial evidence to support an action, the Commission has a duty to carry out, and certainly public interest demands a further investigation and supplementing of the record.

It was noted in the *Universal Camera Corp.* case, *supra*, at page 491, where the court below misapprehended or grossly misapplied the standard this Court *will* intervene to assure proper judicial review of an agency's action.

The Three-Judge District Court below erred in its judicial review of an Interstate Commerce Commission interpretive ruling because of its misapprehension of the "substantial evidence" standard. Only a review of the

record with the available legal principles at hand will completely show the lower court's error.

Clearly the matter was presented to the Examiner on, and the Examiner agreed with, the contention that "all traffic integrated with, tendered on, transported on, and delivered on wheels which are part of the shipment brings that traffic automatically within" the description trailers designed to be drawn by passenger automobiles. The Commission subsequently added a new and different standard with respect to the interpretation of its certificates, *i. e.*, that any commodity to be a trailer designed to be drawn by passenger automobile must "retain mobility"; declared that the sectionalized mobile homes did not; and reversed its Examiner. *Thus, a standard was deemed critical which was not litigated at the hearing before the Examiner* and obviously not an issue upon which any evidence was presented intentionally one way or the other. Can it be said that the public interest is served by such after-the-hearing promulgation of issues?

The United States District Court (Three-Judge) for the Eastern District of Pennsylvania in *E. Brooke Matlack, Inc.* v. *U. S. and I. C. C.*, 119 F. Supp. 617 (D. C. E. D. Pa. 1954) reversed the commission and held as follows:

> "That the Interstate Commerce Commission has the right from time to time to change its policies cannot be questioned. The Supreme Court of the United States in the case of *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80-89, 63 S. Ct. 454, 87 L. Ed. 626, has decided that an agency may from time to time promulgate standards expressing a more

sensitive regard for what is right and what is wrong than those prevalent at a prior time. However, where, as here, an applicant relying in good faith upon previously determined standards, as expressed in previous written statements or conclusions of the agencies, acts in strict accordance with such standards, such applicant should not be precluded from an opportunity to meet the revised standards if, without notice, the agency determines upon new and perhaps more sensitive standards. This is all the more true where, as here, the applicant has stated in writing and unequivocally that it is in a position to meet such revised standards by competent evidence, if allowed the opportunity to do so.

* * * * * * *

"This request seems to us to be entirely reasonable. In fact, its denial impinges on due process. Having presented an application and having supported it by the quantity and quality of proof indicated as necessary by previous Commission decisions, applicant had in the opinion of the examiner fully sustained its burden. At that point its only burden was to sustain the findings of the examiner."

Appellant is one of the largest transporters of mobile homes in the United States. The transportation of mobile homes is a significant industry affecting interstate commerce. If the commodities involved actually do retain mobility, Appellant and the public face a chaotic situation. If they are placed in certain locations with the idea that should danger arise they can be moved, then the safety of these items is seriously endangered and the public interest is obvious. Appellants state, as they did before the court below, that if this issue had been raised at the hearing the proof would have shown these homes to have retained mobility.

The Commission reached a decision contrary to its own Examiner and based on inference alone or at most on the slenderest threads. The lower Court in its Opinion and Order on Petition for Rehearing (J. S. 48) stated that "the facts pertaining to mobility were presented only casually to the Examiner" and yet concluded that the Commission's reversal of its Examiner, by adding a new and unforeseen standard of interpretation without offering to permit or requesting evidence thereon, was based upon substantial evidence. This Court should give plenary consideration to determine whether the evidence here only "casually presented," when other issues were thought to be determinative, can be the substantial evidence required by the statute.

The Appellees' Motion to Affirm has been given close scrutiny, especially with regard to their contention that the findings of the Commission were supported by substantial evidence. (M. A. 5) Generally speaking, their examples represent grasping at straws. The only evidence located by Appellees was a tenuous inference from Exhibit 5, which was a brochure published by one of the shipper-manufacturers. The inference is unsupported by any direct testimony. The brochure contents were mere *advertising sales talk* by one manufacturer to attract customers by informing them of easy financing. Appellees ignore direct testimony by another of the manufacturers.

Appellees' Motion to Affirm contends that "neither the manufacturers nor the other carriers of sectionalized prefabricated houses pointed to any" retained mobility. (M. A. 6) Isn't this simply another way of stating that

there is nothing in the record as to mobility or lack of mobility and therefore there is a lack of substantial evidence on this point?

Appellees further contend, under point number 1 of their Motion to Affirm (M. A. 4), that "The Commission's interpretation of its own certificates is controlling upon the reviewing courts unless clearly erroneous. . . ." With this Appellant cannot disagree; but Appellees overlook the fact that if the Commission's interpretive ruling is not based upon substantial evidence *it is clearly erroneous.*

2. THE COMMISSION'S DISPOSITION OF THE APPLICATION WAS BASED UPON AN IMPROPER STANDARD

The promulgation by the Commission of the factor of "retained mobility" in its disposition of the application herein under consideration created a new and unforeseen standard and one which was not contemplated by applicant, appellant here, in the preparation and trial of its application. See *E. Brooke Matlack, Inc.* v. *United States et al.*, 119 Fed. Supp. 617 (1954).

The factor of retained mobility has no place in the interpretation of the certificate herein under consideration as its applicability to said certificate would create only chaotic and burdensome questions of interpretation to which neither the carrier nor the public at large has been heretofore subjected. The Commission, at page 33 of its report (J. S. Appendix B), took notice of the existing practices of the industry relating to the sale of so-called house trailers and their utilization for purposes of

permanent housing with the undercarriages (generally owned by the shipper or seller) being only a means of conveyance, saying:

> "We recognize that the undercarriage, outbound, constitutes an integral part of the trailer being transported. Nevertheless, we also recognize that it is a common practice in the industry to remove the undercarriage or wheels from trailers when they have been towed to a destination where it is anticipated that they will remain for some time. In such an instance, when the return of the undercarriage is part of a preconceived plan of the shipper at the time the outbound transportation is performed, the authorized carrier which performed the out bound service should also be allowed to return the undercarriage."

Thus, the Commission in the concluding paragraph of its own report patently contradicts its prior reliance upon the factor of retained mobility, all of which demonstrates a lack of due process which was extended to this appellant by the Commission. The District Court completely failed on judicial review to correct this patent error of interpretation.

As recently as June 23, 1965, the United States District Court, Southern District of Mississippi, Eastern Division, reversed the Interstate Commerce Commission in the matter of *Dixie Highway Express, Inc., et al.*, v. *U. S. and I. C. C., et al.*, ... Fed. Supp. ....., 16 F. C. C. 81, 749, admonishing the Commission for lack of consistency of its administrative rulings and adopting different standards for similar situations, finding such action to be arbitrary.

Even in its report on appellant's petition for rehearing, the District Court again sidestepped the basic question of the pertinency of the factor of retained mobility, concluding merely that the evidence of record did not substantiate any retained mobility on the part of the sectionalized homes here in question.

We contend that if the Court had given proper consideration to the pertinency of the mobility factor in the interpretive question herein, it would have been obliged to rule in appellant's favor. On the other hand, if the Court after due consideration of this question determined to rule in favor of the Commission, under the circumstances of applicant's past reliance upon the inapplicability of such factor due process would have required the Court to remand the application to the Commission for further hearing limited solely to the receipt of evidence of retained mobility on the part of the sectionalized homes here in question.

CONCLUSION

For the foregoing reasons, this Court should give plenary consideration to the issues presented by this appeal (1) to determine whether the evidence only "casually presented" can be the "substantial evidence" required by the statute upon which the Commission can reverse its own Examiner by adding a new and unforeseen standard of interpretation without permitting evidence thereon; and (2) to determine whether the new and unforeseen factor of retained mobility is inconsistent with prior rulings and arbitrary. Such a reversal is obviously based upon a finding on an issue not thought to be determinative by either the applicant, protestants or Hearing Examiner.

Respectfully submitted,

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